UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	
	)	Criminal No. 4:93CR14WC
PAUL B. CLARK,	)	
	)	Violation:
Defendant.	)	15 U.S.C. § 1

UNITED STATES' RESPONSE IN OPPOSITION TO
DEFENDANT'S MOTION TO DISMISS INDICTMENT

I. INTRODUCTION

On July 22, 1993, a grand jury in this District returned an indictment charging the defendant with participating in a conspiracy to rig bids submitted for contracts to supply dairy products to certain public schools and other institutions in eastern Mississippi. The indictment charges that the conspiracy began at least as early as 1977 and continued at least through August 1988. On September 15, 1993, the defendant filed a motion to dismiss the indictment against him, claiming that the five-year statute of limitations applicable to criminal violations of the Sherman Act, 15 U.S.C. § 1, expired before the grand jury returned the indictment.

An indictment, sufficient on its face, cannot be dismissed because of a defendant's belief that the allegations will not be supported by adequate evidence at trial. Moreover, even if the defendant's motion were ripe, it is still without merit because he ignores the relevant case law concerning the commencement of the statute of limitations in criminal conspiracy cases. Citing City of El Paso v. Darbyshire Steel Co., 575 F.2d 521 (5th Cir. 1978), cert. denied, 439 U.S. 1121 (1979), the defendant urges the

Court to ignore the applicable law construing 18 U.S.C. § 3282, the statute of limitations governing criminal conspiracies, and to bar his prosecution based upon a case that never discussed the criminal statute of limitations. Rather, it concerned the statute of limitations applicable to civil antitrust actions, 15 U.S.C. § 15b. Finally, the defendant argues that even if the relevant law governing the duration of criminal antitrust conspiracies is applied to this case, the government has no proof of an act in furtherance of the conspiracy within the statutory period. In making this argument, the defendant most likely has overlooked a check dated August 2, 1988. This check was paid to one of the conspirators for dairy products purchased pursuant to a contract that was rigged. As the government has already told the defendant, this check will be introduced at trial as evidence of an act in furtherance of the conspiracy.

For the reasons set forth below, the defendant's motion should be denied.

II. BACKGROUND

Public school districts in eastern Mississippi typically purchase half-pint cartons of whole white milk, low-fat white milk, chocolate milk, low-fat chocolate milk, and other dairy products from dairies in connection with providing meals to the public school students of eastern Mississippi. In the spring or summer of each year, eastern Mississippi public school districts send bid solicitations to dairies requesting competitive bids for contracts to supply dairy products to the public schools in the districts

during the next school year. Dairies that participate in the bidding generally submit the bids in sealed envelopes to the school district by a specified date and time. Federal funds partially reimburse or subsidize the public school districts in eastern Mississippi for their purchases of food items, including dairy products, used in providing meals to the public school students of eastern Mississippi.

On July 22, 1993, a grand jury sitting in the Southern District of Mississippi returned an indictment, a copy of which is attached, charging the defendant with a one-count violation of the Sherman Act, 15 U.S.C. § 1. The indictment charges the defendant with participating in a conspiracy to rig bids for the supply of dairy products to certain school districts and other institutions in eastern Mississippi, beginning at least as early as 1977 and continuing at least through August 1988. Pursuant to the conspiracy, the defendant, while employed by Flav-O-Rich, Inc., made agreements with representatives of other dairy companies to submit collusive, rigged bids to various school districts in eastern Mississippi, or to refrain from bidding at all. The submission of collusive bids, as well as the refraining from bidding, ensured that the company which was designated by the conspirators to be the winning bidder in a given school district submitted the lowest bid, won the contract, and received payments under the contract.

III. ARGUMENT

A. The Indictment Alleges A Continuing Conspiracy From At Least As Early As 1977 And Continuing At Least Through August 1988

The statute of limitations for criminal conspiracies, including conspiracies to violate § 1 of the Sherman Act, is five years. 18 U.S.C. § 3282; United States v. A-A-A Elec. Co., 788 F.2d 242, 244 n.3 (4th Cir. 1986). The indictment in this case charges the defendant with entering into a conspiracy to rig bids submitted for the award and performance of contracts to supply dairy products to certain public schools and other institutions in eastern Mississippi. (Indictment ¶ 2.) The indictment alleges that the conspiracy began "at least as early as 1977, and continu[ed] thereafter at least through August 1988 . . . ." Id. It further charges that "[t]he combination and conspiracy . . . was carried out, in part, in Lauderdale County . . . within the five years preceding the return of this indictment." (Indictment ¶ 13.) The indictment, which the grand jury returned on July 22, 1993, therefore alleges a conspiracy that continued into the five-year statute of limitations period.

In considering a motion to dismiss, the factual allegations in an indictment must be accepted as true. United States v. Sampson, 371 U.S. 75, 78-79 (1962); 1 Charles A. Wright, Federal Practice and Procedure § 194, at 714 & n.12 (2d ed. 1982) (and cases cited therein). For purposes of a Rule 12(b) motion to dismiss, the indictment must be tested "not by the truth of its allegations but 'by its sufficiency to charge an offense.'" United States v. Mann, 517 F.2d 259, 266 (5th Cir. 1975), cert. denied, 423 U.S. 1087 (1976) (quoting Sampson, 371 U.S. at 78-79). The defendant's contention, therefore, that the conspiracy did not extend to

the time alleged by the indictment raises a factual question which would be inappropriate to attempt to resolve prior to trial. The defendant, in short, may not seek to dismiss the indictment on the ground that an allegation in the indictment--sufficient to charge that the conspiracy continued through August 1988--is not supported by adequate evidence. See Mann, 517 F.2d at 267 (citing Costello v. United States, 350 U.S. 359, 363 (1956)).

In United States v. Walker, 514 F. Supp. 294 (E.D. La. 1981), the defendant moved to dismiss an information filed against him on, among other grounds, the assertion that "the government's evidence at trial will necessarily vary from the allegations set out in the information and this variance requires dismissal of the information . . . ." 514 F. Supp. at 299. The court summarily denied the motion, ruling that the motion was not ripe for consideration. Id. at 301. The court explained that by its very language, Rule 12(b) permits a defendant to raise by a pretrial motion "'[a]ny defense, objection, or request which is capable of determination without the trial of the general issue.'" Id. (quoting Fed. R. Crim. P. 12(b)). The defendant's variance argument, however, could not be determined pretrial because "by definition, a variance cannot arise prior to the close of proof in a criminal trial." Id. at 302. The court added that it could not "credit the defense counsel's representations as to what the evidence at trial will demonstrate because this Court is neither endowed with the psychic powers to predict what the evidence at trial will establish nor empowered with the authority to make any determination along these lines . . . but must accept the allegations in the pleadings without considering any evidence outside the pleadings proffered by any party."

Id. (emphasis added) (citations omitted).

On its face, the indictment in this case is valid and charges a conspiracy that continued at least through August 1988. The government is required to prove at trial that the conspiracy existed during the five-year limitations period, and will do so. But the defendant may not, at this preliminary stage of the case, use a Rule 12(b) dismissal motion to challenge the factual assertions made by the grand jury.

B. The Conspiracy Charged In The Indictment Continued Until The Last Payment Pursuant To A Rigged Bid Was Received by the Designated Low Bidder

In addition to being premature, the defendant's motion to dismiss the indictment shows a misunderstanding of the statute of limitations in criminal antitrust cases. For statute of limitations purposes, a bid-rigging conspiracy continues "until either the final payments are received under the illegal contract or the final distribution of illicit profits among the co-conspirators occurs." United States v. Dynalectric Co., 859 1559, 1565 (11th Cir. 1988) (citing United States v. Evans & Assocs. Constr. Co., 839 F.2d 656 (10th Cir. 1988); United States v. Northern Improvement Co., 814 F.2d 540 (8th Cir. 1987); A-A-A Elec., 788 F.2d 242 (4th Cir. 1986); United States v. Inryco, Inc., 642 F.2d 290 (9th Cir. 1981), cert. dismissed, 454 U.S. 1167 (1982)).

In 1910, the United States Supreme Court ruled that a criminal antitrust conspiracy continues until its objectives are achieved or abandoned. United States v. Kissel, 218 U.S. 601 (1910); see also Dynalectric, 859 F.2d at 1563. To identify those objectives, a court must look to the conspiratorial agreement at issue, the "relevant contours" of which are charged in the indictment. 859 F.2d. at 1563-64.

The indictment in this case charges that a "substantial term[]" of the bid-rigging agreement among the defendant and his co-conspirators was "to permit the corporate conspirators to supply dairy products to certain public schools . . . in eastern Mississippi and receive payments therefor pursuant to contracts awarded on the basis of collusive, noncompetitive, and rigged bids." (Indictment ¶ 3 (emphasis added).) The indictment also charges that "[f]or the purpose of forming and carrying out" the conspiracy, the defendant and his co-conspirators did, among other things, the following:

> (e) accept[ed] the award of contracts to supply dairy products to certain public schools in eastern Mississippi pursuant to collusive, noncompetitive, and rigged bids;
>
> (f) suppl[ied] dairy products to certain public schools in eastern Mississippi pursuant to contracts awarded on the basis of collusive, noncompetitive, and rigged bids; and
>
> (g) accept[ed] payment for the supply of dairy products to certain public schools in eastern Mississippi pursuant to contracts awarded on the basis of collusive, noncompetitive, and rigged bids.

(Indictment ¶ 4.)

Obviously, the indictment establishes that a significant purpose of the charged conspiracy was for the conspirator dairy companies to receive payments for the milk they supplied to the affected school districts. The defendant and his co-conspirators broke the law in order to make money; rigging bids and winning contracts were but steps toward that goal. [1]

[1] The Eleventh Circuit, discussing the motives behind antitrust offenses, said in Dynalectric that "[i]t is inconceivable to us that any business would conspire to restrain trade solely for the sake of restraining trade; the attendant battery of civil and criminal penalties for antitrust violations simply is too threatening to convince us that anybody would attempt to restrain trade without also having the further goal of

Therefore, the conspiracy continued until the final time a payment for milk was received by a conspirator. [2]

Defendant's contention that his culpability for the conspiracy ended when he signed, or caused to be signed, a July 1987 bid, and his contention that "[t]he statute of limitations began to run in this case when the school district awarded the bid to the dairy company and a contract was created," is contrary to the law governing criminal antitrust conspiracies. In making these arguments, the defendant mistakenly relies upon the holding in City of El Paso v. Darbyshire Steel Co., 575 F.2d 521 (5th Cir. 1978), cert. denied, 439 U.S. 1121 (1979), a

civil antitrust case. The defendant recognizes, however, that he cannot square City of El Paso with the Fifth Circuit's opinion in United States v. Girard, 744 F.2d 1170 (5th Cir. 1984), a case that construed the statute of limitations applicable to a violation of 18 U.S.C. § 371, the general criminal conspiracy statute. (See Def.'s Mem. Supp. Mot. to Dismiss Indictment at 2.) Following well-established precedent, the Fifth Circuit

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financial self-enrichment by virtue of restraint of trade. We believe that a central objective of a conspiracy to restrain trade is to garner illicit profits." Dynalectric, 859 F.2d at 1568.

[2] In his memorandum of authority, the defendant twice contends that "the government has offered no proof that Paul Clark or any alleged co-conspirator received any payments after July 22, 1988." In a strict sense, this is true, since there has not yet been a trial at which the government could offer that proof. However, the United States, pursuant to its obligations under Fed. R. Crim. P. 16, made available to the defendant a copy of a check to a co-conspirator dairy from the Jones County School System dated August 2, 1988. The United States explicitly told the defendant that it would offer the check as evidence of an act in furtherance of the charged conspiracy.

recognized in Girard that a criminal conspiracy continues until the conspiratorial objectives are satisfied. 744 F.2d at 1172. Looking to the indictment in the Girard case--which alleged bid fraud on contracts to the Housing Authority of New Orleans--to determine the scope of the conspiracy, the Fifth Circuit identified three conspiratorial objectives, including the obtaining of Housing Authority funds (i.e., payments) under the contract. The court rejected the same argument the defendant makes here--that the conspiracy's objectives were fulfilled with the awarding of the contract--and held that the conspiracy continued "until Girard had received the full monetary benefits under the contract . . . ." Id.

In contrast to the criminal conspiracy statute of limitations in Girard, the issue before the Fifth Circuit in City of El Paso was the triggering event for the four-year statute of limitations governing a civil cause of action brought under § 4 of the Clayton Act. See City of El Paso, 575 F.2d at 523. The court held that on the day the parties finalized their rights and liabilities with one another--i.e., when they signed the contract--"any damages caused by the alleged conspiracy were provable with certainty on that date." Id. 3[3]/ As Girard illustrates, however, none of this is germane to the question of when the statute of limitations begins to run for the prosecution of a defendant for engaging in a criminal conspiracy, including criminal antitrust conspiracies.

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[3]It is worth noting that City of El Paso does not hold that a cause of action for civil damages accrues in all cases at the time a contract is created. The court said that if damages are not precisely calculable at the time of the contract, because, for example, future payments are subject to adjustments, the causes of action might accrue at a later time. See City of El Paso, 575 F.2d at 523.

Generally in conspiracy cases, the statute of limitations begins to run not from the date of legally cognizable harm, but from the date of the last overt act. E.g., Grunewald, 353 U.S. at396-97; Hyde v. United States, 225 U.S. 347, 369 (1912). In antitrust conspiracy cases, however, the limitations period does not begin to run until the time of the conspiracy's abandonment or success, Kissel, 218 U.S. at 608; Inryco, 642 F.2d at 293; see generally Toussie v. United States, 397 U.S. 112, 115 (1970); Grunewald, 353 U.S. at 396-97, because the law is violated simply by an agreement in restraint of trade and proof of an overt act is not necessary. United States v. Socony Vacuum Oil Co., 310 U.S. 150, 224 n.59 (1940); Nash v. United States, 229 U.S. 373, 378 (1913), All acts impliedly or expressly contemplated by the conspiracy--even the act of a single conspirator--keep the conspiracy alive. Socony-Vacuum Oil, 310 U.S. at 253-54.

The defendant is not the first to misapply City of El Paso to a criminal antitrust prosecution. In Dynalectric, a case involving bid rigging by electrical contractors, the defendants mistakenly relied on City of El Paso when arguing that their prosecutions were time barred. Dynalectric, 859 F.2d at 1567. In the Dynalectric case, the Eleventh Circuit made short shrift of the arguments the defendants advanced under the reasoning of City of El Paso, recognizing that the statute of limitations for a criminal conspiracy begins to run once the objectives of a conspiracy are fulfilled or are abandoned. The Eleventh Circuit ruled:

> We conclude that [City of El Paso] is not helpful in this case because it does not involve an interpretation of the appropriate statute of limitations. The

> requirement that a cause of action accrue in a civil antitrust case before the statute of limitations begins to run is separate and distinct from--not cumulative to--the requirement in a criminal antitrust case that the statute of limitations begins to run when the conspiracy is completed . . . . [W]e agree with the government that accrual of a cause of action for civil statute of limitation purposes and completion of the conspiracy for criminal statute of limitations purposes are two entirely different and distinct issues.

859 F.2d at 1567.

In A-A-A Elec., the Fourth Circuit flatly rejected suggestions that it apply civil antitrust statute of limitations principles to a criminal prosecution of 15 U.S.C. § 1, holding that a Sherman Act criminal conspiracy case "is controlled not by 15 U.S.C. § 15b or the cases interpreting that provision but by an entirely different statute, 18 U.S.C. § 3282, governing the limitations period for criminal conspiracies, including those of a continuing nature." 788 F.2d at 246 n.4 (emphasis added). In so ruling, the Fourth Circuit followed clearly established case law. Indeed, no court has ever applied civil antitrust cases to determine when the statute of limitations on a criminal antitrust conspiracy begins to run.

Although the defendant must recognize that City of El Paso does not in any way involve the criminal statute of limitations, he nonetheless urges

the court to follow the analysis found in that civil case, in spite of the clear rulings by the Eleventh and Fourth Circuits on this very issue. In fact, the starting dates for the respective, different statutes of limitations are entirely unrelated. In civil cases, the statute of limitations under § 4 of the Clayton Act begins to run "[w]here rights and liabilities are finalized by a contract or by denial of a contract and any damages are at that time provable with certainty . . . ." Midwestern Waffles, Inc. v. Waffles House, Inc., 734 F.2d 705, 715 (11th Cir. 1984) (citing City of El Paso). In a criminal antitrust case, however, the statute begins to run only when the conspiracy is completed because its objectives have been accomplished or abandoned. Kissel, 218 U.S. at 610; United States v. Coia, 719 F.2d 1120, 1125 (11th Cir. 1983), cert. denied, 466 U.S. 973 (1984). Depending on the facts of each antitrust violation, then, the criminal conspiracy can conclude before, after or at the same time that a civil cause of action accrues; the dates on which the respective statutes of limitations begin to run are entirely unrelated. Accordingly, City of El Paso and other civil antitrust cases are inapplicable to the current proceeding.

V. Conclusion

The defendant has moved to dismiss the indictment on a ground that is not ripe for decision by this Court. The degree to which the evidence in this case supports the allegations in the indictment cannot be demonstrated until the government has presented its evidence at trial. The defendant's motion to dismiss the indictment under Rule 12(b) must therefore be denied.

Even if the evidentiary issue were ripe, defendant still is not

entitled to a dismissal. As is clear from the indictment, in order for the defendant and his co-conspirators to achieve the objectives of the conspiracy, it was not enough to submit rigged bids and enter into contracts with school boards on the basis of those bids. The objectives of the charged conspiracy were successful only when the conspirators received payments for the milk from the affected school districts. As long as the government can show a payment was made less than five years before the date when the grand jury returned the indictment against the defendant, the defendant's prosecution is not barred by 18 U.S.C. § 3282. As stated earlier, the United States has provided the defendant with a copy of a check dated August 2, 1988, which will be introduced at trial as an act in furtherance of the charged conspiracy.

For the reasons stated herein, the defendant's motion to dismiss the indictment should be denied.

Respectfully submitted,

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